

Seismic Testing Consultation Put to the Test

Nunavut Mining Symposium

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Consultation - Challenges

There can be questions about how much consultation is adequate to satisfy the Crown's Duty to Consult

- The NIRB process?
- Is more consultation needed?



Earlier Case

Qikiqtani Inuit Association v. Canada - case regarding the RV Polarstern in August, 2010

Injunction granted by the Nunavut Court – despite the having obtained the “requisite” approvals and conducting the “required” consultation



Clyde River Case - Status

Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)

Held: National Energy Board (“NEB”) consulted as required

Seismic testing currently on hold

Supreme Court of Canada

Hearing: November 2016

Decision: Pending (anytime now)

Who is involved?

The Parties:

Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization – Clyde River, and J. Natanine

v.

TGS-NOPEC Geophysical Company ASA (TGS), Petroleum Geo-Services Inc. (PGS), Multi Klient Invest as (MKI) (together the “Proponents”), and Canada (A-G)

What is the Case About?

Facts:

The dispute was about the issuance of a Geophysical Operations Authorization (“Authorization”) by the NEB to conduct offshore seismic testing in Baffin Bay and the Davis Strait

The NEB granted the Authorization

A judicial review of the decision was taken to the Federal Court of Appeal – saying Crown had not complied with the Duty to Consult and Accommodate the Inuit

The FCA agreed that the Crown could rely on the NEB process to comply with the Duty

What is the Case About?

The Issues:

Has the Crown (“in right of Canada”) satisfied its Duty to Consult and Accommodate Canada’s Aboriginal people?

Can the Crown rely on the National Energy Board’s authorization process to satisfy the Duty to Consult and Accommodate the Inuit of Clyde River?

Was the NEB authorization process adequate?

What Did the Federal Court of Appeal Say?

The Court equated the implementation of the NEB regulatory process as a “mandate [on the NEB] to engage in a consultation process such that the Crown may rely on that process to meet, at least in part, its duty to consult with Aboriginal peoples”
(para 65)

What should we expect?

We do not know....

The case was heard by the SCC along with another case involving a decision of the NEB (*Chippewas of the Thames First Nation v. Enbridge*)

The SCC granted leave to appeal both cases together and the arguments were heard together.

The SCC seems to want to say something about the Crown's Duty to Consult as it pertains to the NEB

Implications for other Tribunals as well

Compare: the Clyde River FCA decision to the Chippewas decision

Clyde River:

“For these reasons, I am satisfied that to date the Board’s process afforded meaningful consultation sufficient that the Crown may rely upon it to fulfil its duty to consult.” (para 100)

Chippewas:

“...none of this is to say that the Board had the duty or power to actually perform the consultation. It is a point of agreement between [the majority, minority and the parties] that the Board is incapable of actually fulfilling the duty to consult. To the extent that the Minister purported to rely on the Board to fulfill the duty to consult, he did so in error.” (para 120)

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